able them to be called. Alternatively, the respondents would have to apply for a fresh order in which case the appellants might be moved to raise the plea of *res judicata* which in fact was raised in the course of the arguments. In all the circumstances of this case I cannot see any reason why the second Motion should not have been granted by the court. The variation sought by the respondents did not affect or alter the operative or substantive part of the order. The order in its varied form still directs the three meetings to be called.

The instant appeal which is against the granting of the second Notice of Motion by the respondents must be considered in the light of what happened arising from the October 8 order. In Civil Appeal No. 131 of 1974 the appellants appealed against the order to the Federal Court. Pending the hearing of the appeal they unsuccessfully applied to the High Court for a stay of execution. Their further application to the Federal Court for a stay under section 73 of the Courts of Judicature Act, 1964 was dismissed. In a judgment dated June 6, 1974 delivered by me and agreed to by the rest of the court I referred to the variation made by the learned judge in these words:

"The effect of the variation made by the court below was merely to ensure that the meeting or meetings be called as directed. The complaint against the variation is without substance."

Had the instant appeal been listed before the Federal Court at its sitting in Johor Baru I have no doubt that it would have been dismissed for the same reason. I now come to the appeal against the order of October 8 as varied by the late judge. The arguments in the appeal turned mainly on the question whether the learned judge had properly exercised his discretion under section 143(4)(b) of the Companies Act, 1965. Holding that he had the Federal Court dismissed the appeal. As far as I am aware the appellants have not taken the matter any further. We were informed at the hearing that the three meetings have already been held. So whatever points that can arise for our consideration are only of academic importance.

It is, I think, settled law that when an order of the High Court has once been perfected the court has no jurisdiction to alter it. See re *Suffield and Watts, ex Parte Brown*[1] and also *Preston Banking Company* v. *William Allsup & Sons*.[2] In the instant case the order has not been substantially altered as to make it an entirely new order. If it had not been so varied the whole purpose of the order would have been defeated. On the facts as well as on the law I have no doubt that the second Motion was rightly granted.

This appeal is dismissed with costs to be paid by the second and third appellants personally.

Suffian L.P. and **Lee Hun Hoe C.J. (Borneo)** concurred.

Appeal dismissed.

Solicitors: *Mah-Kok & Taye; Sault & Co.*

MAK SIK KWONG v. MINISTER OF HOME AFFAIRS, MALAYSIA

[O.C.J. (Abdoolcader J.) May 27, 1975]
[Ipoh — Originating Motion No. 34 of 1973]

Administrative law — Certiorari — Application to quash order of deprivation of citizenship — Whether ouster clause in Federal Constitution precludes application for a prerogative order — Whether respondent in making order of deprivation of citizenship performing a purely administrative or ministerial act — Whether order amenable to order of certiorari — Federal Constitution, arts. 24(2) & 27 & 2nd Sch. Pt. III s. 2.

Constitutional Law — Citizenship — Deprivation of — Certiorari — Federal Constitution, arts. 24(2) & 27 & 2nd Sch. Pt. III s. 2.

In this case the applicant had applied by motion for an order of *certiorari* to remove into the court and quash the respondent's order of deprivation of his citizenship. The respondent subsequently brought an application by way of summons in chambers to set aside the motion. It was submitted for the respondent (a) that the provisions in the Schedule to the Federal Constitution that the decision of the Federal Government thereunder shall not be subject to appeal or review in any court, precluded an application for a prerogative order or indeed any form of judicial proceeding; (2) that the respondent in making an order of deprivation of citizenship was performing only an administrative or ministerial act and that therefore his order is not amenable to *certiorari*.

Held: (1) the ouster provision in the Schedule to the Federal Constitution did not preclude the court from entertaining the application for an order of *certiorari*. Whether grounds for an order can be established and whether the application for *certiorari* will succeed, are matters which can be decided at the hearing of the substantive motion itself;

(2) the respondent in this case was in fact acting at the very least at one stage in the process in a quasi-judicial capacity in making an order of deprivation of citizenship and not performing a purely ministerial or administrative act. In any event, the respondent was under the constitutional provision determining the rights of individuals and was also under a duty to act fairly. Orders therefore made by the respondent under Article 24(2) of the Constitution are amenable to the prerogative order of *certiorari*;

(3) the application for *certiorari* is therefore not precluded in this case but whether it can avail the applicant will have to be determined on the grounds and merits of the application.

Cases referred to:-

(1) *Soon Kok Leong* v. *Minister of Interior, Malaysia* [1968] 2 M.L.J. 88.
(2) *In re Soon Chi Hiang* [1969] 1 M.L.J. 218.
(3) *Reg.* v. *Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 Q.B. 574.
(4) *Tehrani & Anor.* v. *Rostron* [1972] 1 Q.B. 182, 187-8.
(5) *Liew Shim Lai* v. *Minister of Home Affairs* [1970] 2 M.L.J. 7.
(6) *Kannan & Anor.* v. *Menteri Buroh dan Tenaga Rakyat & Ors.* [1974] 1 M.L.J. 90.
(7) *Sungei Wangi Estate* v. *Uni s/o Narayan Nambiar* [1975] 1 M.L.J. 136.
(8) *The Colonial Bank of Australasia & Anor.* v. *Willan* (1874) L.R. 5 P.C. 417, 442.
(9) *Secretary of State* v. *Mask & Company* (1940) L.R. 67 I.A. 222, 236.
(10) *Board of Governors of the London Hospital* v. *Jacobs* [1956] 1 W.L.R. 662, 669, 676
(11) *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147, 195, 197, 207.
(12) *Rediffusion (Hongkong) Ltd.* v. *Attorney-General of Hongkong & Anor.* [1970] A.C. 1136.
(13) *Re Chua Ho Ann* [1963] M.L.J. 193, 195.
(14) *R.* v. *Dublin Corporation* (1878) L.R. 2 Ir. 371, 376.
(15) *Ridge* v. *Baldwin* [1964] A.C. 40, 74-76.
(16) *Durayappah* v. *Fernando* [1967] 2 A.C. 337.
(17) *Rex* v. *Woodhouse* [1906] 2 K.B. 501, 535.
(18) *Reg.* v. *Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299.

(19) *Reg.* v. *Birmingham City Justice, ex parte Chris Foreign Foods (Wholesalers) Ltd.* [1970] 1 W.L.R. 1428, 1433.
(20) *R.* v. *Manchester Legal Aid Committee, ex parte Brand (R.A.) & Co. Ltd.* [1952] 2 Q.B. 413.
(21) *Ishak* v. *Thowfeek* [1968] 1 W.L.R. 1718, 1725.
(22) *Reg.* v. *Greater Birmingham Appeal Tribunal, ex parte Simper* [1973] 2 W.L.R. 709, 713.
(23) *Reg.* v. *Paddington Valuation Officer, ex parte Peachey Property Corporation Ltd.* [1966] 1 Q.B. 380.
(24) *Province of Bombay* v. *Khushaldas S. Advani* AIR 1950 S.C. 222, 225-6, 260.
(25) *Shivji Nathubhai* v. *Union of India* AIR 1960 S.C. 606, 608.
(26) *Commissioners of Customs and Excise* v. *Cure & Deeley Ltd.* [1962] 1 Q.B. 340, 359f, 366-8.
(27) *Ross-Clunis* v. *Papadopoullos & Ors.* [1958] 1 W.L.R. 546 (P.C.), 558-9.
(28) *Attorney-General for Canada & Anor.* v. *Hallet & Carey Ltd.* [1952] A.C. 427, 450.
(29) *Secretary of State for Employment* v. *ASLEF (No. 2)* [1972] 2 Q.B. 455, 492-3, 499.
(30) *Estate & Trust Agencies (1927) Ltd.* v. *Singapore Improvement Trust* [1937] A.C. 898.
(31) *Board of Trustees of the Maradana Mosque* v. *Budiuddin Mahmud & Anor.* [1967] 1 A.C. 13, 23.
(32) *Land Commissioner* v. *Pillai* [1960] A.C. 854, 880.
(33) *Coleen Properties Ltd.* v. *Minister of Housing and Local Government* [1971] 1 W.L.R. 433.
(34) *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 M.L.J. 129.
(35) *Lim Lian Geok* v. *Minister of Interior, Federation of Malaya* [1964] M.L.J. 158, 164.
(36) *Jayawardane* v. *Silva* [1970] 1 W.L.R. 1365.
(37) *Shell Co. of Australia* v. *Federal Commissioner of Taxation* [1931] A.C. 275, 298.
(38) *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* [1949] A.C. 134, 149.
(39) *Chief Building Surveyor* v. *Makhanlall & Co. Ltd.* [1969] 2 M.L.J. 118, 120-1, 122.
(40) *Faridsons Ltd.* v. *Government of Pakistan* P.L.D. 1961 S.C. 537.
(41) *Abul A'la Maudoodi* v. *Government of West Pakistan* P.L.D. 1964 S.C. 673.
(42) *University of Dacca* v. *Zakir Ahmad* P.L.D. 1965 S.C. 90.
(43) *Mohd. Siddique* v. *Chief Settlement and Rehabilitation Commissioner* P.L.D. 1965 S.C. 123.

SUMMONS IN CHAMBERS.

Mohideen Abdul Kader for the applicant.

Lim Beng Choon (Senior Federal Counsel) for the respondent.

Abdoolcader J.: The Minister of Home Affairs, Malaysia, the respondent in these proceedings, seeks in an application by way of summons in chambers to set aside the motion filed by the applicant for an order of *certiorari* to remove into this court and quash the respondent's order of deprivation of his citizenship.

The facts and background:

Mak Sik Kwong @ Mak Kwong, the applicant in these proceedings, was born on September 11, 1934, in Tanjong Rambutan, Perak, and was a citizen of Malaysia by operation of law under the provisions of Article 14(1)(a) of the Federal Constitution. He has been under detention since November, 1966, under section 8 of the Internal Security Act, 1960.

On September 25, 1971, he was served with a notice by the Registrar-General of Citizens, Malaysia, dated September 20, 1971, to the effect that the respondent proposed to make an order under Article 24(2) of the Constitution depriving him of his citizenship of Malaysia on the ground that he had voluntarily claimed and exercised in the foreign country, namely, Communist China, rights available to him under the law of that country, being rights accorded exclusively to its citizens, and informing him of his right to apply to have his case referred to a committee of inquiry constituted for that purpose under Article 27(2) of the Constitution within one calendar month, and that in default the respondent would proceed to make an order of deprivation of his citizenship.

By a letter dated October 1, 1971, to the Registrar-General of Citizens, the applicant claimed his right to have his case referred to a committee of inquiry which was duly constituted for that purpose and before which he appeared on several occasions. The respondent then made an order on April 5, 1973, depriving the applicant of his citizenship of Malaysia with effect from March 22, 1973, on the ground stated in the notice of deprivation.

The applicant then commenced these proceedings and having obtained leave of the court on November 20, 1973, to apply for an order of *certiorari* to remove into this court and quash the order of deprivation of citizenship made by the respondent on April 5, 1973, filed the substantive motion in these proceedings on December 3, 1973, for an order of *certiorari* accordingly; in the statutory statement annexed to his application the applicant specifies eight grounds on which the relief claimed is sought.

The respondent's summons and the issues involved:

The respondent then filed a summons in chambers on February 5, 1974, for an order that the applicant's motion be struck out on the grounds that it is misconceived and irregular, discloses no reasonable cause of action and is an abuse of the process of the court, and that it be accordingly dismissed with costs. Notwithstanding these broad generalisations couched in somewhat extravagant language, the basis of the respondent's summons as it appears in the supporting affidavits thereto and as presented in argument before me by Mr. Lim Beng Choon, Senior Federal Counsel, appearing for the respondent, can however be suitably reduced in tangible terms to a two-fold objection involving only two issues in law, namely:

(1) that the ouster clause in section 2 of Part III of the Second Schedule to the Constitution precludes the applicant from coming to this court to seek an order of *certiorari;* and
(2) that, in any event, the respondent who made the order of deprivation is not amenable to an order of *certiorari,* as, in making the order, he was not performing any judicial or quasi-judicial function but only a purely administrative or ministerial act.

It was expressly urged and agreed by counsel on both sides that the respondent's summons should be heard *per se* in the first instance and before the substantive motion of the applicant, since an order in favour of the respondent on his summons would conclusively determine these proceedings. The summons was in view of its nature and importance accordingly adjourned into open court and submissions thereon concluded some 6 days ago.

The relevant provisions of the Constitution:

It might perhaps be convenient at this stage for ease of reference to set out the relevant provisions of the Constitution operative in these proceedings which are Articles 24(2) and 27 and section 2 of Part III of the Second Schedule to the Constitution:

Article 24(2):

"24.(2) If the Federal Government is satisfied that any citizen has voluntarily claimed and exercised in a foreign country any rights available to him under the law of that country, being rights accorded exclusively to its citizens, the Federal Government may by order deprive that person of his citizenship."

Article 27:

"27.(1) Before making an order under Article 24, 25 or 26, the Federal Government shall give to the person against whom the order is proposed to be made notice in writing informing him of the ground on which the order is proposed to be made and of his right to have the case referred to a committee of inquiry under this Article.

(2) If any person to whom such notice is given applies to have the case referred as aforesaid the Federal Government shall, and in any other case the Federal Government may, refer the case to a committee of inquiry consisting of a chairman (being a person possessing judicial experience) and two other members appointed by that Government for the purpose.

(3) In the case of any such reference, the committee shall hold an inquiry in such manner as the Federal Government may direct, and submit its report to that Government; and the Federal Government shall have regard to the report in determining whether to make the order."

Section 2 of Part III of the Second Schedule to the Constitution (the Schedule provision):

"2. A decision of the Federal Government under Part III of the Constitution shall not be subject to appeal or review in any court."

I pause to add that the respondent exercises the functions of the Federal Government under the relevant Articles by virtue of the provisions of section 1 of Part III of the second Schedule to the Constitution.

The first issue: Whether the Schedule provision precludes an application for certiorari.

Senior Federal Counsel for the respondent submits as his first ground for the summons that the Schedule provision precludes an application for a prerogative order or indeed any form of judicial proceedings.

The Schedule provision was considered in two cases, and Ismail Khan J. (as he then was) in *Soon Kok Leong* v. *Minister of Interior, Malaysia*[1] and Raja Azlan Shah J. (as he then was) in *In Re Soon Chi Hiang*[2] both held (*albeit obiter* in the latter case) that it does not preclude recourse to the courts by way of application for an order of *certiorari*, relying on and applying the *locus classicus* in this context, *Reg.* v. *Medical Appeal Tribunal, Ex parte Gilmore*[3] which has been treated in succeeding judgments as virtually holy writ of untouchable sanctity. *Ex parte Gilmore*[3] was applied in *Tehrani and Another* v. *Rostron*[4] and Lord Denning M.R. said in his judgment (at pages 187-8):

"The modern cases establish this principle: when Parliament says that a decision of an inferior tribunal is to be 'final', it does so on the assumption that the tribunal will observe the law. Parliament only gives the impress of 'finality' to the decision on the condition that it is reached in accordance with law: and the Queen's courts will see to it that this condition is fulfilled. Accordingly if a tribunal goes wrong in law and the error appears on the face of the record, the High Court will interfere by *certiorari* to quash the decision. It is not to be deterred by the enactment that the decision is 'final'. The decision may be final on the facts, but it is not final on the law. This was settled by *Reg.* v. *Medical Appeal Tribunal, Ex parte Gilmore*[3] where all the cases are collected. Likewise if a board or a Minister is entrusted with a decision affecting private rights, then even though it is said to be 'final', the High Court can ensure that it is correct in point of law."

Ong Hock Sim J. (as he then was) however in delivering judgment in an application to set aside a banishment order in *Liew Shin Lai* v. *Minister of Home Affairs*[5] made an observation by way of peroration that any attempt to challenge an order of deprivation of citizenship would be barred by the Schedule provision. With respect, I do not think that this point in fact arose in that application and presumably the matter was not argued and earlier authorities not cited but, in any event, it is clear that this observation of the learned judge was strictly *obiter*. I am unable, with respect, to agree with the dictum in that case.

Syed Othman J., held in *Kannan and Another* v. *Menteri Buruh dan Tenaga Rakyat and Ors.*[6] that the decision of the Minister of Labour and Manpower can be questioned and is amenable to an order of *certiorari* notwithstanding the finality provision appearing in section 16A(5) of the Industrial Relations Act, 1967. And I had occasion recently to observe in *Sungei Wangi Estate* v. *Uni s/o Narayan Nambiar*[7] that it is now settled law that this court has power to issue an order of *certiorari* to quash a decision of the Industrial Court which on the face of it discloses an error of law notwithstanding the much wider and far-reaching provisions of the privative clause enacted in section 29(3)(a) of the Industrial Relations Act.

I do not think that there can be any doubt now that it is settled law that a finality or privative clause does not restrict in any way whatsoever the power of the courts to issue *certiorari* to quash for jurisdictional defect, error of law on the face of the record or manifest fraud. The same process of reasoning has even permitted the courts to interpret ouster clauses expressly referring to prohibition and *certiorari* and taking away the right to apply for such remedies as still permitting the grant of those remedies for lack of jurisdiction or fraud but the lack of jurisdiction or the fraud must be manifest.

The Privy Council held in *The Colonial Bank of Australasia and Another* v. *Willan*[8] that where *certiorari* is said to be taken away by statute, the superior court is not absolutely deprived of the power to issue the writ (now order), but its action as to the writ is controlled and limited, and it cannot quash the order removed by *certiorari* except upon the ground either of a manifest defect of jurisdiction in the tribunal that made the order, or of manifest fraud in the party procuring it. In *Secretary of State* v. *Mask & Company*[9] Lord Thankerton in delivering the judgment of the Privy Council stated (at page 236):

"It is settled law that the exclusion of the jurisdiction of the civil courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the civil courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the

statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

It is clear that the *raison d'etre* for the inroads into privative and ouster clauses is that the courts constitute the channel through which the King's justice is dispensed to his people and are accordingly the bastion of the rights of the individual. The courts must therefore necessarily be the ultimate bulwark against the excesses of the executive. This does not mean, however, that the courts have a roving commission to scrutinise and reverse or approve any and every decision of an administrative agency or statutory trbiunal whenever it is challenged by an aggrieved person, but they must be available at all times for recourse as a guarantee against any arbitrary action and to prevent injustice to the individual.

The courts act upon the presumption against the ouster of their jurisdiction in the absence of express and very clear provisions, and this presumption is enhanced where the question to be determined is one of private rights (*Board of Governors of the London Hospital* v. *Jacobs*[10]) and the authority who is alleged to have been empowered by statute to determine the question exclusively is an administrative or other than judicial authority (*ibid*).

If a remedy exists at common law, that remedy will be deemed to have been taken away only where the statute clearly and expressly so provides, and a line of authorities have established the principle that mere finality, privative or ouster provisions will not necessarily have that effect. In 1929, Lord Sankey, then the Lord Chancellor of England, spoke of the majestic function performed by the judiciary:

"Amid the cross-currents and shifting sands of public life the Law is like a great rock upon which a man may set his feet and be safe, while the inevitable inequalities of private life are not so dangerous in a country where every citizen knows that in the Law Courts, at any rate, he can get justice."

Senior Federal Counsel concedes that the authorities show that notwithstanding an ouster clause the courts can interfere but only on two grounds, namely, jurisdictional defect and error of law on the face of the record. He submits, however, that the respondent's order of deprivation of citizenship in this case is a speaking order and the affidavits cannot be looked at to supplement the record. He further contends that an ouster clause is not wholly without effect and that it is inapplicable only if a decision or order is made in manifest defect or jurisdiction or manifest fraud or under an error of law apparent on the face of the record, and that in the circumstances the court has no jurisdiction to go behind the order of deprivation made by the respondent. The gist of his argument is that as there is in fact no error of law apparent on the face of the record and no defect in jurisdiction, the respondent having acted in exercise of his powers under Article 24(2), the court cannot intervene and therefore should not even entertain an application for an order of *certiorari*.

I must say that I find this submission somewhat a curious one as the question on the respondent's summons to strike out the applicant's substantive motion at this stage of the proceedings appears to me to be whether I can entertain an application for an order of *certiorari* and not whether I should grant an order, and this would certainly not entail a consideration of the merits or grounds of the substantive motion which would only arise at the hearing of the motion itself. I am at the moment concerned only with the respondent's summons and the grounds on which it is founded.

Whether in the circumstances of a case in the nature of the proceedings before me the court can, or indeed ever will be able to, grant an order of *certiorari* to quash an order of deprivation of citizenship is an entirely different matter which will have to be considered on its merits at a later stage. As I have already pointed out, the statutory statement annexed to the applicant's motion sets out eight grounds for relief including error of law and excess of jurisdiction. Each case must be considered on its merits *per se* and in the absence of excess or lack of jurisdiction or error of law on the face of the record, the court will not of course be able to interfere but these considerations would surely only arise at the hearing of the substantive application for an order of *certiorari*.

To accede to the request of Senior Federal Counsel to consider at this stage and only on this summons to strike out the substantive application both the legal prerequisites and the merits and grounds of the main application (without hearing arguments thereon!) as a package deal would give rise in my view to a situation which would best be described as a classic example of circular tail-chasing with no forward movement — a vicious cul-de-sac consisting of a continuous catena of 'you can but you cannot' and *vice versa*. Difficulties not envisaged by Senior Federal Counsel could and might well arise in considering the legal effect of the Schedule provision and the grounds of the applicant's motion together and at the same time as, for example, perhaps in a not inconceivable situation where the respondent condescends to give particulars in addition to the ground for deprivation itself. It must be remembered that the power conferred on the respondent is not an unlimited power but one the limits and extent of which are defined by the Constitution itself. It is not for the respondent to define the extent of this power but for the court to decide this on the true construction of the relevant constitutional provisions in any particular case (*Anisminic Ltd.* v. *Foreign Compensation Commission*[11] (at pages 195, 197 *per* Lord Pearce; at page 207 *per* Lord Wilberforce).

Reliance placed by Senior Federal Counsel in his final reply on *Rediffusion (Hong Kong) Ltd.* v. *Attorney-General of Hong Kong & Another*[12] in support of his contention that the substantive motion of the applicant be set aside in limine at this stage and on this summons is in my view wholly misplaced. It is abundantly clear that the respondent's summons only questions the jurisdiction of this court to entertain the application for *certiorari* on the two grounds in law put forward as the basis of that contention. The question of cause of action does not arise at this stage on the hearing of this summons and will only do so when the grounds and merits of the substantive application are considered. To put it more succinctly, the question of whether there is a cause of action will no doubt be ventilated if and when the time comes for

the proverbial second bite at the cherry or perhaps in a local context I should say the chiku.

In his final reply however Senior Federal Counsel seeks to resile somewhat from the submissions he made earlier in presenting the respondent's case and now contends that by virtue of the provisions of section 25(2) of the Courts of Judicature Act, 1964, *certiorari* is now a statutory remedy subject to statutory limitations and that therefore the power of the courts to issue orders of *certiorari* is subject to its being exercisable in accordance with the Schedule provision. He elaborates on this contention by submitting that if the determination by the respondent is one under Article 24(2), then the Schedule provision will apply and preclude any application for *certiorari* which would be tantamount to a request for review by or an appeal to the court against the determination of the respondent in respect of which he has an absolute discretionary power under Part III of the Constitution, and that the concept of the ouster clause in the Schedule provision must be determined in this context. I regret I can find no merit or substance at all in this contention, and even allowing for a change of stance at this stage, I do not think it carries the matter any further or affects the conclusion I have reached on the inefficacy of the Schedule provision in precluding an application for *certiorari* as it only seems to do no more than beg the question.

I hold accordingly that the Schedule provision does not preclude the court from entertaining the application for an order of *certiorari*. Whether grounds for an order can be established and whether the application for *certiorari* will, or indeed any such application can ever succeed, is a matter that must be left open at the moment pending the hearing of the substantive application itself.

The second issue: Whether the respondent in making an order of deprivation of citizenship is performing a purely administrative or ministerial act and not a quasi-judicial function.

Senior Federal Counsel submits that the respondent in making the order of deprivation of the applicant's citizenship was performing only an administrative or ministerial act and that therefore his order is not amenable to *certiorari*, and in support of this contention he relies on the decision of Buttrose J., in the Singapore case of *Re Chua Ho Ann*.[13] That case did not involve either the Federal or Singapore Constitution but the provisions of section 22 of the Singapore Citizenship Ordinance, 1957, prescribing a deprivation procedure similar to that to be found in the relevant provisions of the Federal Constitution. It concerned, *inter alia*, an application for an order of prohibition against the Minister for Home Affairs and Buttrose J., held (at page 195) that as the functions of the Minister in carrying out the provisions of the Singapore Citizenship Ordinance and in making his final decision to deprive a person of his citizenship were fundamentally administrative, an order of prohibition did not lie against the Minister; the Minister was answerable to the legislature but his actions could not be controlled by the courts. It is my misfortune not to be persuaded by that decision and I would venture to say that in my view, and with respect, it is against the trend and current of authority and established principles.

Senior Federal Counsel at the conclusion of his submission before me on this aspect agreed when I raised this question that in acting under Article 24(2) the respondent is in fact determining the legal rights of individuals. I think it is clear that an act or decision may be held to be of a judicial character if it imposes obligations upon or affects the rights of individuals. These rights or duties need not be in any sense private rights or duties of the individuals affected; it is sufficient that their rights as citizens should be in jeopardy. May C.J. in the Irish case of *R. v. Dublin Corporation*[14] (at page 376) said:

> "It is established that the writ of *certiorari* does not lie to remove an order merely ministerial, such as a warrant, but it lies to remove and adjudicate upon the validity of acts judicial. In this connection the term 'judicial' does not necessarily mean acts of a judge or of a legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others."

Certiorari and prohibition may now issue in proper cases to a body which exercises functions that are analytically and ostensibly administrative and which is not even required to act judicially in the performance of those functions (*Ridge* v. *Baldwin*[15]). The obligation to act judicially in accordance with the principles of impartiality and fairness may be incurred by a body exercising discretionary administrative powers which seriously encroach on individual interests (*Durayappah* v. *Fernando*[16]). In *Rex* v. *Woodhouse*[17] Fletcher Moulton L.J. in his judgment (at page 535) stated that it is well established that *certiorari* will issue to a body which would not ordinarily be called a court nor would its acts ordinarily be termed 'judicial acts' and that in this context the term 'judicial act' is used in contrast with purely ministerial acts. He went on to state that in general a judicial act was one which involved "the exercise of some right or duty to decide" a question affecting individual rights "in order to provide scope for a writ of *certiorari* at common law."

It has also been held that it is enough in order for *certiorari* or prohibition to lie for the competent authority to be under a duty to act fairly (*Reg.* v. *Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators' Association*[18] — a leading case on the implied duty to act fairly). In *Reg.* v. *Birmingham City Justice, Ex parte Chris Foreign Foods (Wholesalers) Ltd.*,[19] Lord Parker C.J. stated (at page 1433) that a justice acting under the procedure of the Food and Drugs Act, 1955, even though acting in an administrative or executive capacity, was obliged to act fairly and impartially.

It would seem therefore no longer necessary to show that the function was essentially of a judicial nature (*Ridge* v. *Baldwin*;[15] *Durayappah* v. *Fernando*[16]) or that the person or body making the decision was under an express or even an implied duty to follow a procedure analogous to the judicial (*R.* v. *Manchester Legal Aid Committee, Ex parte Brand (R.A.) & Co. Ltd.*[20]). It will be sufficient if there is an obligation to decide questions of law or fact af-

fecting individual rights and exercise a judicial or limited discretion (*ibid*). A purely administrative or executive function is one where there is no duty to afford a hearing to the parties interested, and where the decision can be made on the basis of policy considerations only.

Even in arriving at an administrative decision, there may be a judicial or quasi-judicial interlude, and at that stage the deciding authority will have to act in a quasi-judicial manner — a situation resolving in effect into a hybrid mixture of administrative and quasi-judicial functions where the two elements are intermingled closely.

The obligation imposed on the respondent under Article 27(2) to refer to a committee of inquiry the case of a person who so applies (and the discretion to the same effect in any other case) would clearly seem to be an interposition, albeit indirectly, of a procedure bearing a superficial resemblance to a *lis inter partes*, to afford such a person the opportunity of answering the case against him and making representations in regard thereto and being heard before an order of deprivation is made, no doubt in recognition of the fact that citizenship is a vested and valuable right which should not be taken away summarily and peremptorily by a mere stroke of the pen. Article 27(3) provides that in the case of any such reference the committee shall hold an inquiry and submit its report, and the respondent "shall have regard to the report in determining whether to make the order."

The connotation of the words "shall have regard to" was considered by the Privy Council in *Ishak* v. *Thowfeek*[21] and Lord Pearson in delivering the judgment of their Lordships stated (at page 1725):

"The requirement that the board shall 'have regard' to certain matters tends in itself to show that the board's duty in respect of these matters is limited to having regard to them. They must take them into account and consider them and give due weight to them, but they have an ultimate discretion and are not bound to select a person or persons whom they consider unsuitable."

In *Reg.* v. *Greater Birmingham Appeal Tribunal, Ex parte Simper*,[22] it was held (at page 713) that a direction that "regard shall be had to" certain statutory provisions in assessing the amount of social security benefit payable meant that the person assessing the amount to be paid was to exercise a broad discretion to ensure that there was no overlapping of payments but ought not to proceed on a rule of thumb that exact deductions should be made.

The effect therefore of Article 27(3) is that although the respondent must take into account and consider and give due weight to the report of the committee of inquiry, he has an ultimate discretion; he is only bound to consider the report but not to act on it. But this does not, in my view, detract from the fact that there is by virtue of the provisions of Article 27 a judicial or quasi-judicial element injected into the final determination by the respondent in making an order of deprivation under Article 24(2). I shall revert to this aspect presently.

The Court of Appeal in England has held that *certiorari* was an appropriate remedy to quash the decisions of a valuation officer employed by the Inland Revenue to make valuation assessments for rating purposes. He has power to determine questions affecting the rights of subjects and is under a duty to act judicially even though there are no opposing sides. Therefore, if he prepares a valuation list on a wholly incorrect basis or takes wrong considerations into account, contrary to statutory directions, the list may be quashed; but on the facts, the majority of the court were not prepared to quash the list in that case (*Reg.* v. *Paddington Valuation Officer, Ex parte Peachey Property Corporation Ltd.*[23]).

A ministerial act is the discharge of a duty which involves no exercise of discretion or where the statute prescribes the circumstances in which the duty is to be performed with such particularity that only a minimal exercise of discretion is possible. Where discretionary powers affect the interests of individuals and the policy element is small, an authority may be held to act judicially. As I have already pointed out, the discretion vested in the respondent in this case is subject to or at least relatively dependent upon the duty imposed by Article 27(3) to have regard to the report of the committee of inquiry. In *Province of Bombay* v. *Khushaldas S. Advani*,[24] Kania C.J. stated (at pages 225-6):

"When the executive authority has to form an opinion about an objective matter as a preliminary step to the exercise of a certain power conferred on it, the determination of the objective fact and the exercise of the power based thereon are alike matters of an administrative character and are not amenable to the writ of *certiorari*. . . .

It seems to me that the true position is that when the law under which the authority is making a decision, itself requires a judicial approach, the decision will be quasi-judicial. Prescribed forms of procedure are not necessary to make an inquiry judicial, provided in coming to the decision the well-recognised principles of approach are required to be followed."

In *Shivji Nathubhai* v. *Union of India*,[25] the Supreme Court of India (at page 608) declared as settled law the opinion of S.R. Das J. (as he then was) in *Advani's* case[24] (at page 260) to the following effect:

". . . and (ii) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judical act provided the authority is required by the statute to act judicially."

It is now necessary to consider whether an application for *certiorari* is inhibited in view of the subjective formulation of the power entrusted to the respondent under Article 24(2). To put it differently, the question that arises for consideration is whether or not the matter of the subjective satisfaction provided for in Article 24(2) makes the act of the respondent purely administrative or ministerial with the consequential effect of precluding an application for the prerogative order of *certiorari*.

An *ex facie* unfettered grant of discretionary power does not necessarily preclude or curtail judicial review (*Commissioners of Custom and Excise* v. *Cure & Deeley Ltd.*[26] at page 359 et seq., esp. at pages 366-8; *Ross-Clunis* v. *Papadopoullos and Others*;[27] *Attorney-General for Canada and Another* v. *Hallet & Carey Ltd.*[28]). Statutory tribunals and administrative authorities have not infrequently been conceded power to

determine conclusively the limits of their own jurisdiction, for example, where a matter collateral to the merits is to be proved "to the satisfaction of" the competent authority. When jurisdiction to determine a matter is conferred upon a body in subjective terms, the courts may be more reluctant to assert their judicial power to review the findings. The tendency, however, is for the courts to show extreme reluctance to accept that such language ousts the supervisory jurisdiction altogether.

In *Secretary of State for Employment* v. *ASLEF (No. 2)*,[29] the English Court of Appeal held that the subjective test was not satisfied if the Minister misdirected himself or came to a manifestly unreasonable conclusion, and I would refer in particular to the judgment of Lord Denning M.R. in this connection at pages 492-3. The courts would still be willing to interfere if the competent authority has erred by applying a wrong legal test in determining the material question (*Estate & Trust Agencies (1927) Limited* v. *Singapore Improvement Trust*[30]) or has arrived at a conclusion wholly unsupported by evidence (*Board of Trustees of the Maradana Mosque* v. *Badiuddin Mahmud and Another*[31]), and notwithstanding subjective formulae the courts will not hesitate to assert their broad supervisory jurisdiction and determine *de novo* questions of law and jurisdictional fact where the necessary material for forming an independent opinion is available (*Land Commissioner* v. *Pillai*[32]).

It may well be that where a statute employs a formula in subjective terms such as "if the minister is satisfied that....", these words clearly indicate that it is for the minister to determine whether the conditions are satisfied — or, to put it more accurately, the only condition imposed by law is that the minister shall declare himself satisfied. The courts however have shown a strong tendency to react against attempts to disarm them, and they will intervene if it is shown that the minister has acted arbitrarily or in bad faith or if he had no evidence for some vital finding (*Coleen Properties Ltd.* v. *Minister of Housing and Local Government*[33]). They will similarly intervene on the ground of unreasonableness or if he has not given his mind. to the question on which he must be satisfied or has declared himself to be satisfied on the wrong question (*Maradana Mosque Trustees*[31]). In short, the courts are ever inclined to maintain their normal resistance to the unceasing attempts of parliamentary draftsmen to put executive powers beyond the reach of the law.

Senior Federal Counsel seeks to rely on *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia*[34] for his contention that the subjective satisfaction of the respondent cannot be questioned by or inquired into by the courts. That case however is in my view wholly irrelevant to the issue before me as it decided that subjective satisfaction only excluded a judicial inquiry into the sufficiency of the grounds for detention or whether there was reasonable cause therefor.

A consideration and review of the authorities adumbrated and other pertinent decisions from the main Commonwealth jurisdictions would appear to propound certain principles governing administrative control by the courts through *certiorari* and prohibition. Professor A. T. Markose suggests that there are four such principles but I think a fifth can be usefully added:

(1) Whenever an administrative authority has to make a decision on the basis of an objective condition or fact, it must proceed judicially before it reaches a decision.

(2) Whenever an administrative authority has power to affect the civil rights of individuals, it has a duty to proceed in a judicial manner.

(3) Whenever an administrative authority has to do an act which is not of a purely ministerial nature, it will be subject to the orders of *certiorari* and prohibition if it commits or attempts to commit any act which is *ultra vires* its authority or is *mala fide* even where it is not subject to the rules of natural justice in its procedure.

(4) Even where an administrative authority is empowered to reach a conclusion by the exercise of discretion or on its subjective satisfaction, it will still be amenable to orders of *certiorari* and prohibition if it has a duty to proceed judicially in order to reach that conclusion.

(5) The character of the act sought to be reviewed rather than the character of the administrative authority whose act is sought to be questioned or impugned is the controlling factor in determining the right to an order of *certiorari* or prohibition.

Adverting now to the matter before me: Under Article 24(2) the respondent is required to satisfy himself that a citizen has voluntarily claimed and exercised in a foreign country any rights available to him under the law of that country, being rights accorded exclusively to its citizens, before making an order depriving that person of his citizenship. The process of satisfaction to this effect would appear to be that initially the respondent presumably receives reports and other information on the basis of which he comes to a provisional satisfaction. Thereupon Article 27 comes into operation and by virtue of its provisions a notice in writing will then have to be served on the citizen informing him of the ground on which the respondent proposes to deprive him of his citizenship and of his right to have his case referred to a committee of inquiry. In the course of such inquiry the citizen is given an opportunity to make representations and answer the case against him, and the committee is obliged to submit its report to the respondent who then shall have regard to that report in finally determining whether to make an order of deprivation under Article 24(2).

As I have already said, the intercalation at the instance of the citizen (and in any other case at the discretion of the respondent) of a committee of inquiry between the provisional satisfaction of the respondent and the final satisfaction and action taken by him thereon would appear to be an oblique application of the concepts of fairness and impartiality which are crytallised in the principles of natural justice to ensure full investigation and fair treatment to the individual concerned. I am fortified in this view of a dual stage of provisional and final satisfaction by the observations of Lord Morris of Borth-Y-Gest in delivering the judgment of the Privy Council in *Lim Lian Geok* v. *The Minister of the Interior, Federation of Malaya*[35] (at page 164). Curiously enough, Buttrose J. touched on this aspect of his judgment in *Re Chua Ho Ann*[13] (at

page 195) but apparently attached no significance whatsoever thereto in determining the nature of the Minister's functions in that case.

There would appear to be two stages in the making of an order of deprivation of citizenship under Article 24(2), namely:

(a) when the respondent satisfies himself of the matters required thereunder; and

(b) when he makes the order of deprivation.

Even if the respondent is satisfied at the first stage, he is not bound or obliged to proceed to the second stage and make an order of deprivation, as the operative word in the second limb of Article 24(2) is "may" and not "shall" or "must".

In the first stage, when he is in the process of satisfying himself, the respondent is acting in a quasi-judicial capacity. He has to evaluate the facts before him, perhaps consider the laws of the foreign country concerned and have regard to the report of the committee of inquiry. General considerations of policy do not in fact come in at this stage (*Maradana Mosque Trustees*[31] at page 23). In the second stage, after having satisfied himself he then assumes a very wide discretion in determining whether or not to make the order and at that stage it may well be that policy considerations come in (*R.* v. *Manchester Legal Aid Committee, Ex parte Brand (R.A.) & Co. Ltd.*,[20] at pages 428-9; *Durayappah* v. *Fernando*[16] — applied in *Jayawardane* v. *Silva*;[36] cf. *Shell Co. of Australia* v. *Federal Commissioner of Taxation*,[37] at page 298 and *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.*,[38] at page 149).

It is not necessary that the respondent's function should be essentially of a judicial nature. If the exercise of a power affects the rights of an individual, no superadded duty to act judicially need necessarily be shown as the judicial element in the power can be inferred from the nature of the power itself (*Ridge* v. *Baldwin*,[15] at pages 72, 74-6 *per* Lord Reid; *Chief Building Surveyor* v. *Makhanlall & Co. Ltd.*,[39] at pages 120-1, 122).

It is accordingly my considered view, if it were necessary to classify according to accepted terminology his functions in the exercise of the power under Article 24(2), that the respondent is in fact acting, at the very least at one stage in the process, in a quasi-judicial capacity in making an order of deprivation of citizenship and not performing a purely ministerial or administrative act as submitted on his behalf. In any event, the respondent is under that constitutional provision determining the rights of individuals, and a vested and valuable right at that, and is also under a duty to act fairly. Orders therefore made by the respondent under Article 24(2) are amenable to the prerogative order of *certiorari*.

As an epilogue on this aspect I would venture to suggest that the time has possibly come for a serious re-examination of the question of the compartmental classification of the nature of functions and acts as judicial or quasi-judicial as opposed to administrative, executive or ministerial for the purposes of *certiorari* and also the necessity therefor in order to obviate difficulties such as those presented in this case in considering the availability of this remedy, and, in view of the ever broadening spectrum of administrative functions and powers, perhaps even for consideration of the expediency of adopting the position taken in Pakistan where the distinction between judicial and administrative acts for the purpose of judicial control in general and *certiorari* in particular has been expressly abandoned. In *Faridsons Ltd.* v. *Government of Pakistan*,[40] which was a case concerning the suspension of an import-registration certificate without giving the opportunity of a hearing to the applicant, who sought to quash the order, the Supreme Court of Pakistan held that *certiorari* lies in respect of judicial and administrative acts alike, and this position has been affirmed in successive decisions of the Supreme Court of Pakistan (*Abul A'la Maudoodi* v. *Govt. of West Pakistan*;[41] *University of Dacca* v. *Zakir Ahmed*;[42] *Mohd. Siddique* v. *Chief Settlement and Rehabilitation Commissioner*[43]).

The result:

I accordingly hold that an application for *certiorari* is not precluded in this case and in proceedings of this nature but whether it can avail the applicant is an entirely different matter which will have to be determined on the grounds and merits of the application.

I have considered and discussed a number of authorities which were not referred to by either side but I do not think any further argument is necessary on this score as the principles enunciated therein are well established and incontrovertible. I must nevertheless express my appreciation to both counsel for the careful arguments presented before me.

In the result and for the reasons I have given, the respondent's summons is dismissed with costs. I am now in a position to proceed to hear and determine the substantive application on its merits.

Summons dismissed.

Solicitors: *Mathuram & Co.*

MAK SIK KWONG v. MINISTER OF HOME AFFAIRS, MALAYSIA (NO. 2)

[O.C.J. (Abdoolcader J.) September 2, 1975]
[Ipoh — Originating Motion No. 34 of 1973]

Administrative Law — Certiorari — Application to quash order depriving applicant of his citizenship — Whether order made in excess of or without jurisdiction — Whether order made in breach of rules of natural justice — Federal Constitution, arts. 24(2), 27 & 28(3).

Constitutional Law — Citizenship — Deprivation of — Certiorari — Federal Constitution, arts. 24(2), 27 & 28(3).

Evidence — Proof of foreign law — Evidence Act, 1950, s. 45.

In this case the applicant applied by motion for an order of *certiorari* to quash the order made by the respondent under Article 24(2) of the Federal Constitution depriving the applicant of his citizenship of Malaysia on the ground that he had voluntarily claimed and exercised rights in a foreign country, being rights accorded exclusively to its citizens. The two main grounds of the application were (a) that the respondent in depriving the applicant of his citizenship had acted in excess of or without jurisdiction, that is, to say, *ultra vires* the powers given to him under the Constitution; and (b) that the respondent has so acted in breach of the rules of natural justice.

Held: (1) in this case even if the respondent had wrongly taken into account the applicant's entry into China in 1956 which he was precluded from doing by virtue of the provisions of Article 28(3), there was ample other evidence to justify the respondent's satisfaction that the applicant resided and attended educational institutions in China after Merdeka Day until